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No. 76-1662

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, APPELLANT

v.

BOARD OF COMMISSIONERS OF SHEFFIELD, ALABAMA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The district court's opinions of December 13, 1976 (J.S. App. C, pp. 9a–19a) and March 31, 1977 (J.S. App. B, pp. 2a–8a) are reported at 430 F. Supp. 786.

JURISDICTION

The order of the three-judge district court denying the United States' application for an injunction under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. (Supp. V) 1973c, dismissing the complaint, was entered on December 13, 1976 (J.S. App. D, pp. 20a–21a). The district court's order denying the motion of the United States for reconsidera-

tion was entered on March 31, 1977 (J.S. App. A, p. 1a).

The United States filed a timely notice of appeal on May 11, 1977 (J.S. App. E, p. 22a), and this Court noted probable jurisdiction on June 27, 1977. The jurisdiction of this Court rests on 42 U.S.C. (Supp. V) 1973c and 28 U.S.C. 1253. *Allen* v. *State Board of Elections,* 393 U.S. 544, 560–563; *Perkins* v. *Matthews,* 400 U.S. 379.

STATUTES INVOLVED

Sections 4, 5, and 14(c)(2) of the Voting Rights Act of 1965, 79 Stat. 438–439, 445, as amended, 42 U.S.C. (Supp. V) 1973b, 1973c and 1973l(c)(2), respectively, are set forth in the appendix to the jurisdictional statement (J.S. App. F, pp. 23a–29a).

Title 37, Section 426 of the Code of Alabama (Cum. Supp. 1973) provides in pertinent part:

> In cities having a population of twelve thousand or more, there shall be elected at each general municipal election the following officers, who shall compose the city council for such cities, and who shall hold office for four years and until their successors are elected and qualified, and who shall exercise the legislative functions of city government and any other powers and duties which are or may be vested by law in the city council or its members: A president of the city council, and in cities having seven wards or less, two aldermen from each ward, to be elected by the qualified voters of the several wards voting separately in every ward, except in cities of less than twenty thousand

> population, in which two aldermen from each ward shall be elected by the electors of the city at large, in cities having more than seven wards, one alderman from each ward, and a sufficient number of aldermen from the city at large to make the total number of aldermen fourteen exclusive of the president of the council * * *. Provided however, that the city council of any city having a population of twelve thousand or more may by ordinance or resolution, if adopted by two-thirds vote of the city council more than six months prior to any general municipal election, provide that the city council of said city shall consist of five aldermen to be elected from the city at large. * * *

QUESTIONS PRESENTED

1. Whether voting changes enacted by a city which is within a state designated for coverage under Section 4 of the Voting Rights Act of 1965 must be precleared under Section 5 of the Act before they may become effective.

2. If so, whether the Attorney General's decision to interpose no objection to the holding of a referendum on changing from a commission to a mayor-council form of government constituted clearance of the at-large election of city councilmen under the new form.

STATEMENT

This case involves the application of Section 5 of the Voting Rights Act to certain fundamental changes in the structure of government in the City of Sheffield, Alabama. Sheffield has a population of 13,115,

of whom 19 percent, or 2,526, are black. Eighty-eight percent of the black population resides in one of the city's four wards, where they comprise approximately two-thirds of that ward's population (Stip. Ex. 5; App. 63).[1]

Section 5 of the Voting Rights Act, as amended, 42 U.S.C. (Supp. V) 1973c, provides: "Whenever a State or political subdivision [covered under Section 4 of the Act] shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * *" the change has no effect as law unless "such State or subdivision" obtains a declaratory judgment from the United States District Court for the District of Columbia that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Alternatively, the change may be enforced if the Attorney General has interposed no objection to it within 60 days after its submission to him. States or political subdivisions are subject to Section 5 if they are "covered" by Section 4(b); that is, if they maintained any test or device (as defined by Section 4(c) of the Act, 42 U.S.C. 1973b(c)) as a prerequisite for voting or registration on November 1, 1964, as certified by the Attorney General, and if the Director of the Census determines that less than

[1] "Stip. ———" refers to the [illegible] of fact, and exhibits attached thereto, filed by the parties in the district court. The stipulations and exhibits are reprinted at App. [illegible]–65.

50 percent of the persons of voting age residing within the state or political subdivision were registered on November 1, 1964, or that less than 50 percent of the persons of voting age voted in the presidential election of that year.[2]

On August 6, 1965, the Attorney General and the Director of the Census designated the State of Alabama as covered by Section 4 of the Voting Rights Act. 30 Fed. Reg. 9897. Between August 6, 1965, and June 30, 1977, the Attorney General received for clearance submissions of more than 1,000 changes from the State of Alabama and from cities and counties within it. More than 700 of these submissions were tendered by cities within the State.[3]

On March 20, 1975, the City of Sheffield, Alabama, wrote the Attorney General to "give notice of the proposal of submitting to the qualified voters of the City, whether the present commission form of government shall be abandoned in favor of the Mayor

[2] The operative dates were extended to November 1, 1968, by Pub. L. 91–285, 84 Stat. 315, and to November 1, 1972, by Pub. L. 94–73, 89 Stat. 402.

[3] These figures were derived from a survey of Department of Justice records by the Voting Section of the Department's Civil Rights Division. The record in this case includes a list of all Section 5 submissions made to the Attorney General from August 6, 1965 through January 10, 1977, and the Attorney General's disposition of each submission. This list includes changes submitted by cities within the State of Alabama and by cities and non-registering governmental bodies (*e.g.*, school districts and water districts) within other designated states (Ex. B to Plaintiff's Brief in Support of Motion for Reconsideration and Amendment of Order of December 13, 1976).

and Alderman form * * *." The City stated that "[p]resent existing voting wards are not changed at the time of voting (but may be equitably adjusted at a later date) and in the case of the City of Sheffield, Alabama, the form of government (mayor-alderman) existed in 1912 and if the present commission type is abandoned, the previous form would automatically be reinstated" (Stip. Ex. 1, App. 14). On May 13, 1975, the City's voters approved the proposal (J.S. App. C, p. 10a).

The Attorney General replied to the City on May 23, 1975. He stated that he "does not interpose an objection to the holding of the referendum," but pointed out that his failure to object "does not bar any subsequent judicial action to enjoin the enforcement of the change;" he also noted that "[s]ince voters in the City of Sheffield elected to adopt the mayor-council form of government on May 13, 1975, that change is also subject to the preclearance requirements of Section 5" (Stip. Ex. 2, App. 16).

The Attorney General's letter also requested that the City submit detailed information concerning the change, including a description of "the aldermanic form of government which existed in 1912 and the method by which it was elected, *i.e.*, the number of aldermen, the terms and qualifications for the mayor and aldermen, whether the aldermen were elected at-large or by wards, whether there were numbered post, residency, majority vote or staggered term requirements for the aldermanic seats, and whether single-shot voting was prohibited" (Stip. Ex. 2, App. 17). See 28 C.F.R. 51.10(b).

Thereafter, the City informed the Attorney General that under Alabama law[*] the City would be divided into four wards of substantially equal population, that each ward would have two council seats, that councilmen from each ward would be elected at large, and that candidates would run for numbered places (Stip. Ex. 3, App. 26).

The City later furnished, in response to the Attorney General's request, a detailed map showing ward boundaries, population distribution by race for each ward, and the history of black candidacy for city and county offices since 1965 (Stip. Ex. 4, App. 58–60).

On July 6, 1976, the Attorney General notified the City that he did not "interpose any objection to the change to a mayor-council form of government * * * to the proposed district lines or to the at-large election of the mayor and the president of the council." However, the Attorney General objected to implementation of the proposed at-large method of electing city councilmen because he was "unable to conclude that the at-large election of councilmen required to reside in districts will not have a racially discriminatory effect" (Stip. Ex. 6, App. 64–65).

Notwithstanding the Attorney General's objection, the City scheduled an at-large council election for August 10, 1976. On August 9, the Attorney General filed this action to enforce his Section 5 objection. A temporary restraining order was denied and the election was held. On December 13, 1976, the three-judge

[*] Code of Ala., Title 37, § 426 (Cum. Supp. 1973).

district court convened under Section 5 dismissed the complaint[5] on the ground that that section of the Act provides that only designated states and political subdivisions of states need submit proposed changes in their voting laws for preclearance. A political subdivision is defined in Section 14(c)(2) of the Act, 42 U.S.C. 1973*l*(c)(2), as a county or parish, "except that where registration for voting is not conducted under the supervision of a county or parish," the definition includes any other subdivision which does conduct registration. The district court concluded that the City of Sheffield was not a political subdivision because in Alabama registration is conducted by the counties (J.S. App. C, pp. 14a–15a).[6] Because the

[5] The district court's order of December 13, 1976, withdrew a previous opinion and order of the court, entered September 29, 1976, holding that the Attorney General's objection had been one day late. On reconsideration the court concluded that the 60-day period for interposing an objection under Section 5 expired on July 6, 1976, the next full business day after the 1976 Independence Day holiday (J.S. App. C, p. 11a). See 5 U.S.C. 6103; Executive Order 11582, 36 Fed. Reg. 2957; and 28 C.F.R. 51.3(c).

[6] See Title 17, § 21, Code of Ala. (Recomp. 1958); Title 37, § 34(35), Code of Ala. (Cum. Supp. 1973). The court also held that "by approving the referendum the Attorney General in fact approved the change to the Mayor-Council form of government notwithstanding his caution to the City that the change was also subject to pre-clearance." J.S. App. C, p. 15a. Because Code of Ala., Title 37, § 426 (Cum. Supp. 1973) provides that in Alabama cities of less than 20,000 population, two aldermen from each ward shall be elected at large, the court concluded that the Attorney General's failure to object to the holding of the referendum ended his authority to object to voting changes to be effected under Section 426 if the proposal for a mayor-council government prevailed. Judge Rives declined to concur in this portion of the opinion (J.S. App. C, p. 19a).

question whether changes in the City's government are subject to preclearance had not been briefed or argued before the district court, the United States moved for reconsideration of the ruling and presented evidence in support of its position that preclearance is required. The court denied the motion (J.S. App. A), adhering to its prior position that the definition of "political subdivision" in Section 14(c)(2) "defines the extent of applicability of Section 5 obligations in designated states" (J.S. App. B, p. 6a).

SUMMARY OF ARGUMENT

1. "The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting," and, to effectuate this intention, Congress "marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively." *South Carolina* v. *Katzenbach,* 383 U.S. 301, 315, 337. By holding that cities and other political entities that do not conduct voter registration are excluded from the preclearance requirements of Section 5, even though the states within which they are located are covered by Section 4 of the Act, the district court has severely limited the statute's effectiveness. The district court's ruling is contrary to the Act's structure, its original legislative history, the Attorney General's consistent interpretation of it since its adoption in 1965, and Congress' endorsement of that interpretation upon extending and amending the Act in 1970 and 1975.

The district court based its holding on the proposition that because Sheffield is neither a state nor a

political subdivision, it is not subject to Section 5, which provides that "[w]henever a state or political subdivision" for which coverage determinations have been made under Section 4 seeks to enact a voting change, it must first comply with the preclearance procedure of Section 5. However, when Sections 5 and 4(b) are read in light of the Act's structure, purpose, administration and legislative history, it is clear that all political units within a state which has been designated under Section 4(b), and all political units within a separately designated political subdivision, are subject to Section 5. Only when the state, itself, is not designated under Section 4(b) does it become pertinent to consider, for purposes of Section 4, the definition of "political subdivision" in Section 14(c)(2). If the state has been designated, all local instruments of the state, including counties, parishes and other bodies, are within Section 4's coverage, regardless of whether such entities conduct voter registration. Indeed, the district court noted that if a state is designated, voting changes enacted by "political subdivisions" within that state are automatically subject to Section 5, although such political subdivisions have not been separately designated under Section 4 (J.S. App. B, p. 6a; J.S. App. C, p. 13a).

The legislative history of the 1965 Act shows that Congress understood that local units of government within designated states would be subject to the Act's requirements. In accordance with the Act's structure and history, the Attorney General has consistently

interpreted it as requiring cities and other units of local government to submit proposed changes under Section 5, regardless of whether such units conduct voter registration. This construction of the Act has been endorsed by Congress. In both 1970 and 1975, members of Congress cited examples of voting changes by municipalities and other political units which do not register voters as having potential for diluting minority voting strength and, therefore, as being subject to the preclearance procedures of Section 5. In extending the Act's coverage, Congress drew no distinction between units that conduct voter registration and those that do not.

The legislative history of the 1965 Act shows that, at that time, discrimination against blacks in voting occurred primarily during the registration process. Thus, where an entire state was not designated for coverage, Congress determined that the political unit which conducted voter registration should be subject to the Act. But as Congress and this Court have recognized, changes that may affect minority voting rights are not limited to those occurring during the registration process, and the Act should not be construed as requiring submissions only by entities that conduct registration. See, *e.g.*, *Georgia* v. *United States,* 411 U.S. 526 (reapportionment); *Perkins* v. *Matthews,* 400 U.S. 379 (annexations); *Allen* v. *State Board of Elections,* 393 U.S. 544 (requirements for candidates; requirement that county superintendent be appointed, rather than elected; method of electing

officials; and use of write-in votes). Indeed, *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 320, involved the enforceability of an extension of the closing hour at polling places.

The district court's construction would enable cities within covered states to dilute the voting rights of minorities by such devices as redistricting, annexations and at-large or multi-member elections, even though the use of these devices by local governments was a major reason for adoption and extension of the Act's preclearance requirements.

2. The Attorney General's decision to interpose no objection to the holding of Sheffield's referendum did not constitute clearance under Section 5 of a new method of electing city councilmen. Sheffield's submission related only to the referendum itself, and the Attorney General warned the City that resulting changes in its structure of government would also require preclearance. Moreover, at the time of the submission, Sheffield had not yet indicated the detailed changes that would take place under the new form of government.

ARGUMENT

I. VOTING CHANGES ENACTED BY CITIES WITHIN COVERED STATES ARE SUBJECT TO THE PRECLEARANCE REQUIREMENTS OF SECTION 5

A. THE STATUTORY SCHEME

The district court's conclusion that the City of Sheffield is not subject to the preclearance requirements of Section 5 is based upon a narrow construc-

tion of that section, contrary to this Court's admonition that Section 5 is to be given "the broadest possible scope," *Allen* v. *State Board of Elections,* 393 U.S. 544, 567; *Perkins* v. *Matthews,* 400 U.S. 379, 387. It is true that Sheffield is not a "political subdivision" within the meaning of Section 14. But, as the use of the disjunction indicates, designations under Section 4 are made of states *or* political subdivisions. Only when an entire state is not designated does the definition of "political subdivison" in Section 14 become relevant. Section 14 does not stand isolated from the rest of the Act. Cf. *Allen* v. *State Board of Elections, supra,* 393 U.S. at 558. The language of other sections of the Act, its structure and its purpose, show that Section 5's scope is not limited merely to voting changes enacted *by* states or "political subdivisions", but includes all changes enacted *within* a state or within a political subdivison which has been designated under Section 4(b).

1. The language of the Act

The statute, read as a whole, supports the view that enactments by all component political units of a covered state or political subdivision are subject to the provisions of the statute. Section 4(a) specifies that "no citizen shall be denied the right to vote in any Federal, State or local election because of his failure to comply with any test or device *in* any State" which is covered by Section 4(b) (emphasis added). And Section 4(b) states that the statutory protections "apply *in* any State or *in* any political subdivision of

a State" which is covered by that section (emphasis added). In short, if a state has been designated under Section 4, all governmental entities in that state, including counties, cities, and other bodies, whether or not they register voters, are within Section 4's coverage.[7] Indeed, the district court recognized that

[7] A number of federal district courts have required that Section 5 procedures be satisfied when non-registering municipalities and other units located within covered states enact voting changes. See, *e.g.*, *White* v. *Dougherty County Board of Education*, 431 F. Supp. 919 (M.D. Ga.) (three-judge court) (Board of Education rule affecting candidates for public office); *Darden* v. *City of Hueytown*, N.D. Ala., No. 76-P-1126-S, decided August 30, 1976 (three-judge court) (annexation); *Gaillard* v. *Young*, D. S.C., No. 74-1265, decided March 21, 1975 (reapportionment of Charleston City Council); *Woodard* v. *Lanier*, N.D. Ala., No. CA 74-H-752-S, decided October 22, 1974 (annexations by City of Bessemer); *Jackson* v. *Land*, W.D. La., No. 15,845, decided June 16, 1972 (annexation by Town of Lake Providence).

The question whether voting changes enacted by Texas cities and school districts are subject to Section 5 preclearance is pending before four district courts in Texas. Six lawsuits raising this question have been consolidated before a three-judge court in Dallas. *Hereford Independent School District* v. *Bell*, No. 2-77-14 (N.D. Tex.); *Gomez* v. *Galloway*, No. 76-C-146 (S.D. Tex.); *United States* v. *Trinity Independent School District*, No. H-77-487 (S.D. Tex.); *United States* v. *Hawkins Independent School District*, No. TY-77-81 (E.D. Tex.); *United States* v. *Midland Independent School District*, MO-77-17 (W.D. Tex.); *United States* v. *Board of Trustees of the Chapel Hill Independent School District*, No. TY-77-137-C.A. (E.D. Tex.). Separate lawsuits were also initiated alleging that voting changes enacted by the Westheimer Independent School District had not met the preclearance requirements of Section 5. *Coalition to Preserve Houston* v. *Westheimer Independent School District*, No. 77-H-92 (S.D. Texas); *United States* v. *Westheimer Independent School District*, No. 77-H-121 (S.D. Tex.).

In *Chapel Hill*, *Midland* and *Hawkins*, the school districts notified the Attorney General that in light of the *Sheffield* decision,

if a state is designated, "political subdivisions" within that state, as defined in Section 14(c)(2), are automatically covered (J.S. App. B, p. 6a; J.S. App. C, p. 13a).[8] This automatic coverage does not depend on designation of the political subdivision by the Attorney General and Director of the Census pursuant to Section 4(b). There is little sense in holding, as the district court does, that, while designation of a state automatically subjects political subdivisions to Section 5 notwithstanding the failure to designate them separately under Section 4, the same designation cannot subject cities such as Sheffield to Section 5 because they cannot be separately designated under Section 4. Indeed, it is precisely *because* Sheffield is not a "polit-

they would not heed his Section 5 objections. The Attorney General brought suit to enjoin implementation of the voting changes absent Section 5 preclearance. The single-judge court dismissed *Gomez* v. *Galloway*, *supra*, and, in reliance upon that order, similar orders were entered in *Hereford Independent School District*, *supra*, and *Coalition to Preserve Houston* v. *Westheimer Independent School District*, *supra*. However, the court of appeals reversed the dismissal in *Gomez* and ordered the convening of a three-judge court, C.A. 5, No. 77-1344, decided March 11, 1977. The district court in *Hereford Independent School District*, *supra*, then ordered its dismissal order held in abeyance pending the convening of a three-judge court. On appeal, *Coalition to Preserve Houston*, *supra*, No. 77-1320 (C.A. 5), was remanded on June 6, 1977, and that case has been consolidated with *United States* v. *Westheimer Independent School District*, *supra*.

[8] The legislative history of the 1965 Act requires this conclusion. Both the House and Senate Committee Reports specifically stated: "Where an entire State falls within this subsection [*i.e.*, Section 4(b)], so does each and every political subdivision within that State." H.R. Rep. No. 439, 89th Cong., 1st Sess. p. 23 (1965); S. Rep. No. 162, 89th Cong., 1st Sess., Pt. 3, p. 23 (1965).

ical subdivision" as defined in Section 14(c)(2) that it cannot be separately designated under Section 4. Nor can any city or other entity that does not register voters (even in a non-covered state) be separately designated. Unless Sheffield is covered by the designation of Alabama, therefore, it can never be covered and thus may carry out whatever voting changes it desires, consistent with state law, without regard to the protections afforded by Section 5.

2. The need for uniformity of coverage

Because the scope of Section 5 depends on Section 4, it follows that clearance is necessary for voting changes *within* a covered state, not necessarily enacted by that state itself, and (in non-covered states) for changes within a designated political subdivision, not necessarily enacted by that subdivision itself. Any other construction would mean that the coverage of Section 5 would vary arbitrarily from state to state. Were Sheffield in Georgia, for example, the change involved in this case could be accomplished only by state legislative enactment[9] and thus would unquestionably require Section 5 scrutiny. *Allen* v. *State Board of Elections, supra.*

By contrast, under the district court's analysis in this case, Sheffield would be at liberty to change the location of its polling places without preclearance because Alabama law permits cities to do so.[10] But, as

[9] Code of Ga. Ann., § 69–1018(a)(1) (1976).

[10] Title 37, § 34(24), Code of Ala. (Cum. Supp. 1973).

this Court held in *Perkins* v. *Matthews,* 400 U.S. 379, 388:

> [T]here inheres in the determination of the location of polling places an obvious potential for 'denying or abridging the right to vote on account of race or color.' [citing Section 5] * * * Consequently, we think it clear that § 5 requires prior submission of any changes in the location of polling places.

In effect, then, the district court's decision would allow a city in Alabama to do that which this Court has held a city in Mississippi may not do. Such a departure from this Court's decisions cannot be justified on any considerations of what constitutes a "political subdivision," since the City of Canton, Mississippi, involved in *Perkins,* is no more a "political subdivision" than the City of Sheffield.[11]

Because no two covered states are likely to delegate responsibility for the myriad duties of local government in the same way, there are any number of

[11] Although cities in Mississippi conduct voter registration, Miss. Code, § 21–11–3 (1972), they are not "political subdivisions" within the meaning of Section 14(c)(2) because counties in Mississippi also conduct voter registration, Miss. Code, §§ 23–5–1, 23–5–9. Since cities are political subdivisions under Section 14(c)(2) only if the counties in which they are located do *not* conduct voter registration, Mississippi cities are not "political subdivisions" under Section 14(c)(2). Moreover, nothing in this Court's opinion in *Perkins* suggests that voter registration was a prerequisite to the Court's conclusion that Section 5 applied to Mississippi cities. Indeed, this aspect of the definition of "political subdivision" in Section 14(c)(2) further illustrates the limited function of that definition in the scheme of the Act.

changes in which "there inheres * * * an obvious potential" for discrimination but which, under the district court's rationale, would be subject to scrutiny in some states and immune from scrutiny in others. The scope of federal vigilance over the "extraordinary strategem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination" (*South Carolina* v. *Katzenbach,* 383 U.S. 301, 335) should not depend on the manner of the state's delegation of the authority which, if abused, can lead to voting discrimination. Yet the district court's decision would limit Section 5 in precisely that way. Indeed, under that court's decision, covered states could delegate significant authority to cities such as Sheffield in the knowledge that the cities' exercise of that authority would be beyond Section 5 scrutiny. Section 5, one of the Attorney General's "potent weapons against the evil" of voting discrimination (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 337), should not be so easily defused.

3. The statutory purpose

The decision below, moreover, is inconsistent with the approach of ths Court in *Allen* v. *State Board of Elections, supra,* 393 U.S. at 557–560. *Allen* held that Section 14(b)'s provision that "[n]o court other than the District Court for the District of Columbia * * * shall have jurisdiction to issue any declaratory judgment pursuant to" Section 5 does not apply to suits brought by private litigants seeking a declaratory judgment that a state's action was subject to

Section 5's preclearance requirement. The Court concluded that, despite what appeared to be an unqualified proviso, the congressional intent and the purpose of the Act as a whole would not be served by denying private litigants the right to bring such a suit in their own district. The relationship between Sections 5 and 14, therefore, requires, in light of the remedial purposes of the Voting Rights Act, a broader construction than the district court adopted.

In spite of "Congress' firm intention to rid the country of racial discrimination in voting" (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 315), the district court's cramped construction of the Voting Rights Act would attribute to Congress an intent to subject to Section 5 preclearance only those voting changes enacted by a state or by a political subdivision which conducts voter registration. But, as this Court has recognized, enactments by cities or other units which are not "political subdivisions" within the meaning of Section 14(c)(2) can be as pernicious as state-enacted measures in diluting the voting rights of minorities, *Perkins* v. *Matthews, supra,* 400 U.S. at 388–389, and the Act should be read to reach them.

The Voting Rights Act was enacted to enforce the Fifteenth Amendment, *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 324–327, which prohibits "any *State*" from denying or abridging the right of citizens to vote on account of race or color. The provision of Section 5 making preclearance a requirement for any voting changes "*in* any State" should therefore be

read to encompass all changes by any instrument of a state, for, just as the Court has applied the Fourteenth Amendment to cities and other governmental bodies (see, *e.g.*, *Hunter* v. *Erickson*, 393 U.S. 385; *Evans* v. *Newton*, 382 U.S. 296; *Yick Wo* v. *Hopkins*, 118 U.S. 356), so, too, does the Fifteenth Amendment prohibit discrimination by governmental units other than the state itself (*Terry* v. *Adams*, 345 U.S. 461, 467 (opinion of Black, J.); *United States* v. *Raines*, 362 U.S.C. 17).

Under Alabama law, "[m]unicipalities are but subordinate departments of state government." They are "created by sovereign power in accordance with sovereign will, and * * * [may] exercis[e] such power, and only such power as is conferred on [them] by law." *Alexander* v. *State*, 274 Ala. 441, 443 (Sup. Ct.). Accordingly, the constitutional prohibitions are as applicable to enactments of Alabama cities as they are to enactments of the Alabama legislature, and commensurate application of the protections of the Voting Rights Act is required if those protections are to achieve their important purpose.

B. THE LEGISLATIVE HISTORY OF THE 1965 ACT[12]

In considering the Voting Rights Act, Congress was particularly familiar with abuse of the registra-

[12] "In these cases [concerning Section 5 of the Act], as in so many others that come before us, we are called upon to determine the applicability of a statute where the language of the statute does not make crystal clear its intended scope. In all such cases we are compelled to resort to the legislative history to determine whether, in light of the articulated purposes of the legislation, Congress intended that the statute apply to the particular cases in question." *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 570.

tion process, and it added the "political subdivision" definition to Section 14(c)(2) because the Director of the Census ordinarily did not gather registration statistics beyond the county level, such as from cities or precincts. In non-covered states, therefore, the smallest political unit that could reliably be identified as having less than fifty percent registration (see Section 4(b)), was the county (or other voter-registering unit). That is not to say that Congress intended the Act itself to reach only to the county level. Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., pp. 331–334 (1965) (hereinafter cited as "1965 House Hearings").[13]

But Congress did not intend to prohibit only registration abuses or, indeed, only those tools of discrimination that were in use in 1965. It was well aware that "an insidious and pervasive evil * * * had been

[13] At the time of the passage of the Voting Rights Act in 1965, the registration process was frequently used as a means of denying blacks the right to vote. The States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia enacted tests beginning in 1890 which were still in effect at the time of the 1965 Act and which were specifically designed to prevent blacks from voting. The most common was the literacy test. Other means, including grandfather clauses, property qualifications, character tests and tests requiring interpretation of constitutional or statutory passages were also employed to deny the franchise to blacks. See *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 310–313; H.R. Rep. No. 439, 89th Cong., 1st Sess., pp. 11–13 (1965); S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 4–5, 9–12 (1965). See also 111 Cong. Rec. 10727 (1965) (remarks of Sen. Tydings); 111 Cong. Rec. 8297 (1965) (remarks of Sen. Mansfield).

perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution" and it "marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively." *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 309, 337. A variety of means had been used to deprive blacks of the right to vote, including the white primary and racial gerrymandering, *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 311, and the Voting Rights Act was designed to reach these devices as well as new devices which might in the future be used as tools of racial discrimination. "Congress deliberately used broad language so as to bring under federal scrutiny the many different means by which jurisdictions in the areas covered by the Act might seek to evade the requirements of the Fifteenth Amendment." *City of Petersburg* v. *United States,* 354 F. Supp. 1021, 1030 (D. D.C.), affirmed, 410 U.S. 962.

The district court's construction of the Act would enable cities within covered states to dilute the voting rights of minorities by such devices as redistricting, at-large and multimember elections, and annexations, contrary to this Court's consistent warnings that such devices are subject to scrutiny under the Act. See, *e.g., Perkins* v. *Matthews, supra* (annexations); *Allen* v. *State Board of Elections, supra* (use of at-large elections; requirements for candidates; requirement that officials be appointed, rather than elected; and use of write-in votes); *Georgia* v. *United States,*

411 U.S. 526 (reapportionment). Changes that may affect minority voting rights are not limited to those occurring during the registration process, and the Act therefore should not be construed as requiring submission only by entities that conduct registration.

Nothing in the history of the Act supports the holding below that despite the designation of an entire state, Congress intended to exclude from Section 5 scrutiny voting changes in cities or other governmental units within such states simply because those units do not conduct voter registration. The legislative history indicates quite the contrary understanding. For example, in proposing an amendment which would have stricken Section 5, Senator Talmadge objected that Section 5 requires preclearance for precisely the type of city action at issue here (111 Cong. Rec. 10729 (1965)):

> The language in the pending bill is so phrased that it would relate to any voting qualifications or prerequisite to voting, standard practice or procedure. No matter what kind of legislation might be involved, whether it be from a city council, a resolution of the county commissioners, or an act of the legislature of the States affected, they would have to come to Washington, D.C., and beg the Attorney General to allow them to implement their own legislation * * *.
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> * * * * *
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> * * * If the officials of the town of McDonough * * * decided to change the date on

> which to hold a mayor's election, [or] * * * [i]f a municipality in Georgia desired to hold an election relating to sewage bonds, it would have to come all the way to Washington, D.C., to obtain the approval of the Attorney General and of the District Court for the District of Columbia. * * * [14]
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> * * * * *
>
> * * * This is so far-fetched that if the city of Atlanta wished to hold a referendum to determine whether it would have a mayor-type city government or a city manager city government, and it enacted a law in its council and petitioned the general assembly to that effect, before it could go into effect, it would have to come to Washington to obtain the approval of the Attorney General and the District Court of the District of Columbia before it could implement it. * * * [15]

[14] Appellees have erroneously asserted that in 1965, Georgia cities were political subdivisions within the meaning of the Act (Motion to Affirm, p. 10). Under Georgia law at the time of the passage of the Voting Rights Act, counties conducted voter registration (Code of Ga. Ann., §§ 34–603 to 34–613 (1970)), and cities had the option of conducting their own registration for municipal elections or using the county registration system (Code of Ga. Ann., §§ 34A–502 to 34A–507 (1970)). Thus, as in Mississippi, see n. 11, p. 17, *supra*, Georgia cities were not "political subdivisions" within the meaning of the Voting Rights Act. This dual registration system was retained in subsequent amendments to the election laws (Georgia Laws: Acts of 1968, pp. 871, 873, 885, 899; Acts of 1969, pp. 285, 287; Acts of 1971, Extra Sess., pp. 61, 65, 66, 270; Acts of 1974, pp. 82, 83; Acts of 1975, p. 803; Acts of 1976, pp. 457, 468).

[15] Although this is a statement of an opponent of the bill, it is nevertheless relevant, particularly since the proponents did not disagree with the opponent's analysis. *Arizona* v. *California*, 373 U.S. 546, 583, n. 85. Indeed, this Court has previously noted Senator Talmadge's remarks in considering the scope of Section 5. See *Allen* v. *State Board of Elections*, 393 U.S. 544, 568 n. 32.

The Senate Majority Report in 1965 also recognized that designation of a state under Section 4 would result in the coverage of political units within that state (S. Rep. No. 162, 89th Cong., 1st Sess., Pt. 3, p. 16 (1965)) (emphases added):

> We are also of the view that an entire State covered by the test and device prohibition of section 4 must be able to lift the prohibition *if any part of it is to be relieved from the requirements of section 4.* The statewide ban is a prophylactic measure grounded on the probability of future discrimination *throughout the State* even if it may not now exist in some areas. * * *

Section 4(a) provides that the Act applies to local elections, as well as those conducted at the federal and state level. As Congressman Goodell, quoting from President Johnson's address concerning the voting rights bill, stated, "This bill will strike down restrictions to voting in all elections—Federal, State and local—which have been used to deny Negroes the right to vote." 111 Cong. Rec. 5361 (1965). That the framers of the Voting Rights Act had no intention of enfranchising a citizen for one election but not for another is evident from an exchange between Attorney General Katzenbach and Chairman Celler of the House Judiciary Committee, in which the Attorney General testified that the bill would apply to every

election in a covered state (1965 House Hearings, at p. 21):

> The CHAIRMAN. This bill covers Federal, State, and municipal elections. Would it cover an election for a school bond?
>
> Mr. KATZENBACH. Yes; it would, Mr. Chairman. Every election in which registered electors are permitted to vote would be covered by this bill.

In sum,

> Both the language and the legislative history of the Voting Rights Act of 1965 make it clear that the burden of proof placed on the plaintiff state or political subdivision of the Act [to remove itself from coverage] involves a showing of nondiscrimination not only in county, state, and national elections, *but also in township and municipal elections, and in every other election within the state or political subdivision.* [Emphasis added.]

Gaston County v. *United States,* 288 F. Supp. 678, 691 (D. D.C.) (Gasch, J. concurring), affirmed, 395 U.S. 285.

C. THE ATTORNEY GENERAL'S CONSTRUCTION OF THE ACT

True to the Act's structure and history, the Attorney General has consistently interpreted it as requiring cities within covered states to submit proposed changes under Section 5 regardless of whether such cities conduct voter registration. Between August 6, 1965, and May 1, 1977, the Attorney General received more than 8,100 proposed changes by non-voter registering political units within designated states (or designated political subdivisions) other than

counties or parishes, including not only cities but school, water, and public utility districts. In fact, proposed changes from such units comprise more than half of the proposed changes received. Among these are more than 700 changes from Alabama cities and other non-registering units (see n. 3, p. 5, *supra*). This contemporaneous administrative construction is significant evidence of the Act's meaning, especially in view of the Attorney General's role in drafting the statute.[16] See *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205, 210.

As this Court held in *Perkins* v. *Matthews, supra,* 400 U.S. at 390–391, 393–394 (footnotes omitted):

> Our conclusion that both the location of the polling places and municipal boundary changes come within § 5 draws further support from the interpretation followed by the Attorney General in his administration of the statute. "[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). The Attorney General's interpretation was recently reported by officials of the Department of Jus-

[16] See testimony of Attorney General Katzenbach, 1965 House Hearings at pp. 9 *et seq.* and testimony of Attorney General Katzenbach at the Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pp. 14 *et seq.* (1965). See also testimony of Assistant Attorney General J. Stanley Pottinger at the Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 1st Sess., p. 166 (1975) (hereinafter cited as "1975 House Hearings").

tice in testimony related to the extension of the 1965 Act. * * *

* * * Every change in boundary or election district lines as well as every change in polling places * * * was considered by the Department to be within the scope of § 5. * * *

D. THE LEGISLATIVE HISTORY OF THE 1970 AND 1975 EXTENSIONS OF THE ACT

Although Congress has never explicitly addressed the issue presented in this appeal, in reenacting the statute in 1970 and again in 1975 it should be deemed to have approved the Attorney General's consistent interpretation described above. See Sec. C, *supra;* cf. *Commissioner* v. *Noel Estate,* 380 U.S. 678, 681–682. See also, *Georgia* v. *United States, supra,* 411 U.S. at 533. Indeed, numerous statements made in the course of the 1970 and 1975 reenactments show not only that Congress has never drawn a distinction between governmental entities that conduct voter registration and those that do not, for purposes of extending and amending the prohibitions of the Act, but that it has assumed that both categories are within the Act's coverage.

In enacting the 1975 amendments, both the House and Senate reports [17] cited, as evils to be remedied, examples of changes in voting laws by municipalities and school districts within the State of Texas which diluted minority voting strength. The Senate Report stated (pp. 27–28):

[17] S. Rep. No. 94–295, 94th Cong., 1st Sess., pp. 27–28 (1975); H.R. Rep. No. 94–196, 94th Cong., 1st Sess., pp. 19–20 (1975).

Election law changes which dilute minority political power in Texas are widespread in the wake of recent emergence of minority attempts to exercise the right to vote. The following communities have adopted such changes in the face of growing minority voting strength: Corpus Christi, Lufkin and Waco, in addition to a number of local school districts throughout the state. * * *

The at-large structure, with accompanying variations of the majority run-off, numbered place system, is used extensively among the 40 largest cities in Texas. And under state statute, the countless school districts in Texas elect at-large with an option to adopt the majority run-off, numbered place system. These structures effectively deny Mexican American and black voters in Texas political access in terms of recruitment, nomination, election, and ultimately, representation.

An identical conclusion was reached in the House Report, pp. 19–20, and the testimony from which these examples were drawn specifically noted that "[u]nder the provisions of Section 5 of the Voting Rights Act, all of these changes in electoral arrangements would have to meet preclearance through the Attorney General." [18] Under Texas law, counties conduct voter registration,[19] and thus the cities and school

[18] Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., p. 490 (statement of Dr. Charles L. Cotrell, Professor of Political Science at St. Mary's University in San Antonio, Texas) (1975) (hereinafter cited as 1975 Senate Hearings).

[19] See Vernon's Ann. Tex. Stat. (Election Code), Art. 5.09a (1967); Art. 5.13a (1976).

districts in that state that Congress intended the 1975 amendments to reach are no more "political subdivisions" under Section 14(c)(2) than is the City of Sheffield.

The House and Senate hearings on the 1975 extension of the Voting Rights Act also show the importance attached by proponents of the bill to protecting the right of minority voters to participate at all levels of government. The following dialogue between Senator Tunney and Dr. Cotrell is illustrative (1975 Senate Hearings, at pp. 463–464):

> Senator TUNNEY. * * * [Y]ou are saying that section 5 coverage is absolutely essential to guarantee that the Spanish-speaking citizens in various locations in Texas have an opportunity to participate, not only in voting for the Government, the U.S. Senate, but have a voice also as it relates to water districts and other levels of legislative responsibility which can have a tremendous impact, economic and otherwise, on the lives of those citizens in Texas; and that the discrimination they suffer will occur in these local elections, perhaps even more subtle than in elections for Governor or President or U.S. Senator; is that correct?
>
> Mr. COTRELL. * * * The election of city officials and school board officials is of as vital concern to the citizens, as is the election of U.S. Senators and U.S. Congressmen. And it is in these areas especially, the large concentrations of minorities in the cities, as well as those basically isolated from urban rhythms in east Texas and south Texas, that we must be especially careful to protect and otherwise guarantee voting rights to minority citizens.

Dr. Cotrell's testimony further indicates the importance attached to Section 5 review of voting changes by cities, school districts and public utility districts (1975 Senate Hearings, at p. 462):[20]

> * * * [I]n at least 1,300 political subdivisions [in Texas] the at-large structure is in fact used. If you include such invisible but important areas such as water districts and river authorities, you increase that 1,300. It [illegible]s down basically to something like this. All of the 1,100-plus school districts in Texas are elected at large; 174 of the large cities in the State of Texas elect at large as opposed to 4 with smaller populations, which have single member districts. All cities in the large population areas of the State of Texas include significant proportions of minority population, and all hold at-large city council and school board elections. * * *
>
> The upshot is this, if section 5 of the Voting Rights Act applied to the State of Texas, when the various election rule changes, which have been shown to this subcommittee, were made, the Attorney General would clearly have objected. * * *

[20] See also 1975 Senate Hearings, at p. 16 (statement by Senator Hart that election law changes requiring federal scrutiny include "such tactics as making councilmanic seats at large instead of by district") and 1975 Senate Hearings at p. 234 (statement by Congresswoman Jordan citing the at-large procedures in various Texas cities as a reason for extending the Section 5 preclearance requirements to the State of Texas).

> Bluntly stated, what I would like to say in summary is this, if the Voting Rights Act were extended and expanded to Texas, section 5 would be one of the most important portions of that act because these changes would then have to go through a preclearance formula before the Attorney General. It makes a lot of difference.

The legislative history of the 1975 amendments also contains extensive evidence that Congress was aware of, and agreed with, the Attorney General's construction of the Act as applying to all units of government within covered states. In describing the Attorney General's enforcement of Section 5, Assistant Attorney General J. Stanley Pottinger stated that submissions had been received from the state, county and city level,[21] and he submitted to Congress an extensive exhibit listing Section 5 objections interposed by the Attorney General, including those relating to changes proposed by cities within covered states.[22]

In recounting the history of the enforcement of Section 5, Arthur S. Flemming, Chairman of the United States Commission on Civil Rights, stated (1975 House Hearings, at pp. 40–41):

> Section 5 objections have been entered to changes in voting laws, practices, and procedures that affect every stage of the political process. For example, there have been objections to changes such as annexation of white population to offset the growth of black population in a city; relocation of polling places to sites that inconvenience or otherwise discriminate against minority voters; abolition of offices to which minorities might be elected; converting elective offices into appointive ones to avoid the election of minorities; and imposition of burdensome filing fees. By far the greatest use of section 5 has been to block potentially discriminatory changes in district boundaries, local methods of election, and other voting rules.
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> * * * * *
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> * * * [T]he Attorney General objected repeatedly in 1973 and 1974 to changes submitted by Georgia towns involving the use of staggered terms, majority requirements, and numbered posts.[23] That jurisdictions continue to institute changes to which the Attorney General and the courts have often objected is clear institute changes to which the Attorney General tions offered by section 5 and the Voting Rights Act.[24]

[21] 1975 House Hearings, at p. 170.

[22] *Id.* at pp. 183–184. See also Mr. Pottinger's letter to the City of Grenada, Mississippi, interposing an objection to an annexation by that city. *Id.* at 194–195.

[23] As noted (see n. 14, p. 24, *supra*), towns in Georgia are not "political subdivisions" within the meaning of Section 14(c)(2) of the Voting Rights Act, because counties in Georgia also conduct voter registration.

[24] See also the statement of Howard A. Glickstein, Director of the Notre Dame Center for Civil Rights (1975 House Hearings at p. 332), describing the City of Bessemer, Alabama, as a "covered jurisdiction" in which Section 5 had had a deterrent effect; and the testimony of Armand Derfner of the Lawyers' Committee for Civil Rights under law (*id.* at 631–632) describing the lengthy process of Section 5 preclearance for Charleston, South Carolina's

Not only was Congress aware of the Attorney General's construction of the Act; it intended that the Act continue to be enforced as previously construed. For example, Congressman Rodino summarized the findings of the Judiciary Committee (121 Cong. Rec. H4710 (daily ed. June 2, 1975)) (emphases added):

> * * * [I]n reviewing the continued need for this legislation in those jurisdictions soon eligible for release, we concluded that the act's Federal preclearance requirements, mandating Federal review of all voting changes to be implemented *in covered jurisdictions,* were still needed because of the recent increase in the number of Justice Department objections to potentially discriminatory changes. In other words, in recent years the Justice Department, under the preclearance provision, has halted by means of objections proposed changes in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia, each of which will soon be eligible for exemption from the act unless we act and act quickly. *Those objections have prohibited, in those jurisdictions, discriminatory annexations, redistricting, polling place changes, switches to at-large elections, and other devices which would have adversely affected minority political par-*

redistricting of the city council, and "[t]he change that is going to come in Charleston this year [which] mirrors the change that has come about in the South Carolina house, and in other places where section 5 has been fully effective." In South Carolina, cities do not conduct voter registration. See Code of Laws of South Carolina, §§ 7-5-10, 7-5-30, 7-5-610 to 7-5-630 (1976).

> *ticipation.* The committee found, and I personally suggest to you, that it would simply be unthinkable to now remove the preclearance protections when such changes have been prevented by the Justice Department as recently as 1974 and 1975.

See also *id.* at H4714–H4715 (remarks of Congressman Edwards).

None of the critics of the 1975 legislation took issue with the common assumption that Section 5 applied to all voting changes within covered states. Indeed, they apparently shared this assumption. For example, Senator Allen of Alabama argued (121 Cong. Rec. S13331 (daily ed. July 22, 1975)):

> What I do object to is the fact that every time we pass a law at the State level or an ordinance at the city level or a resolution at the county level that has, by any stretch of the imagination—a wide stretch of the imagination, I might say—anything to do with the voting rights or in the way of voting, it has to be approved either by the Attorney General here in Washington or by the Federal district court for the District of Columbia.

Similarly, Senator Stennis of Mississippi described the scope of Section 5 as follows (121 Cong. Rec. S13072 (daily ed. July 21, 1975)):

> Any [voting] changes * * * which were made in precincts, county districts, school districts, municipalities, or state legislatures, or any other kind of officers, had to be submitted here to the Attorney General for his approval.

Five years earlier, during the consideration of the 1970 extension of the Voting Rights Act (Pub. L. 91–285, 84 Stat. 315), the failure of the City of Anniston, Alabama, to obtain preclearance of a change in its electoral system was brought to the attention of Congress, and members of the Senate cited the Anniston situation as a reason for the retention of Section 5.[25] Anniston, like Sheffield, does not conduct voter registration.

Congress in 1970 was also cognizant of this Court's interpretation of the Act as reaching voting changes other than those affecting the registration process (116 Cong. Rec. 5546 (1970)) (remarks of Senator Ervin):

> The scope of authority of section 5 has been vastly increased by a recent Supreme Court decision, *Allen* v. *State Board of Elections,* 393 U.S. 544 (1969). In that case the Supreme Court defined the act's language—"any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting"—to include "any State enactment which altered the election law of a covered State in even a minor way." (393 U.S. 544). The Court determined that, among other changes, a change in the method of selecting a county official, from election to appointment, had to be submitted to the Attorney General. Changes in city limits, candidate filing fees, times during which polling

[25] Joint View of 10 Members of the Senate Judiciary Committee Relating to the Extension of the Voting Rights Act of 1965, 116 Cong. Rec. 5521 (1970).

> places are open for voting, and any other State or county law or rule in any way connected with voting must be approved by a Federal court in the District of Columbia or an officer of the U.S. Government * * *.

The district court's decision thus is contrary not only to the language and structure of the Act, but also to the Attorney General's consistent course of interpretation of and practice under the Act, and to the legislative history of the Act and its amendments adopted in light of that interpretation and practice.

II. THE ATTORNEY GENERAL DID NOT GIVE PRECLEARANCE TO THE METHOD OF ELECTING COUNCILMEN

If, as we have shown, Section 5 applies, the Attorney General's decision to interpose no objection to the holding of Sheffield's referendum did not constitute clearance under Section 5 of the method of electing city councilmen. In its submission to the Attorney General, Sheffield sought preclearance only for holding the referendum; it did not seek approval for the changes in its form of government which were to be effectuated if the referendum passed. See pp. 5–6, *supra.* Moreover, at the time the Attorney General decided not to object to the referendum (which, in the meantime, had already been held), he warned that any such change would itself require preclearance (p. 6, *supra*). This warning simply reflected the fact that the City had not yet revealed the detailed changes that would take place under the proposed new form of government.

For example, there was some indication that wards as they had existed in 1912 would be restored although ward boundaries were yet to be drawn when the referendum took place (pp. 5–6, *supra*). Under the pertinent regulations, the Attorney General considers a voting change prior to a referendum relating to that change only if "all other action necessary for adoption has been taken." 28 C.F.R. 51.7. In Sheffield, such action had not yet been taken prior to the referendum. Indeed, after the referendum there followed an extensive correspondence between the City and the Attorney General concerning the detailed nature of the change, and its effect on the City's substantial black population (pp. 6–7, *supra*).

In these circumstances, the new form of city government was not before the Attorney General for clearance until the final plan for electing the council from defined wards was adopted and submitted by the city government. The district court thus erred in holding that the Attorney General's decision not to object to the referendum foreclosed any objections to the changes the referendum authorized.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted.

WADE H. MCCREE, JR.,
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